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IN THE

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United States

OCTOBER TERM, 1930

NORTHPORT POWER AND LIGHT COMPANY, a corporation,
Appellant,

vs.

ROLAND H. HARTLEY, as Governor of the State of Washington, and JOHN H. DUNBAR, as Attorney General of the State of Washington.
Appellees.

No. 66

Appeal from the District Court of the United States for the Western District of Washington

REPLY BRIEF OF APPELLANT

W. LON JOHNSON,
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and
O. C. MOORE,
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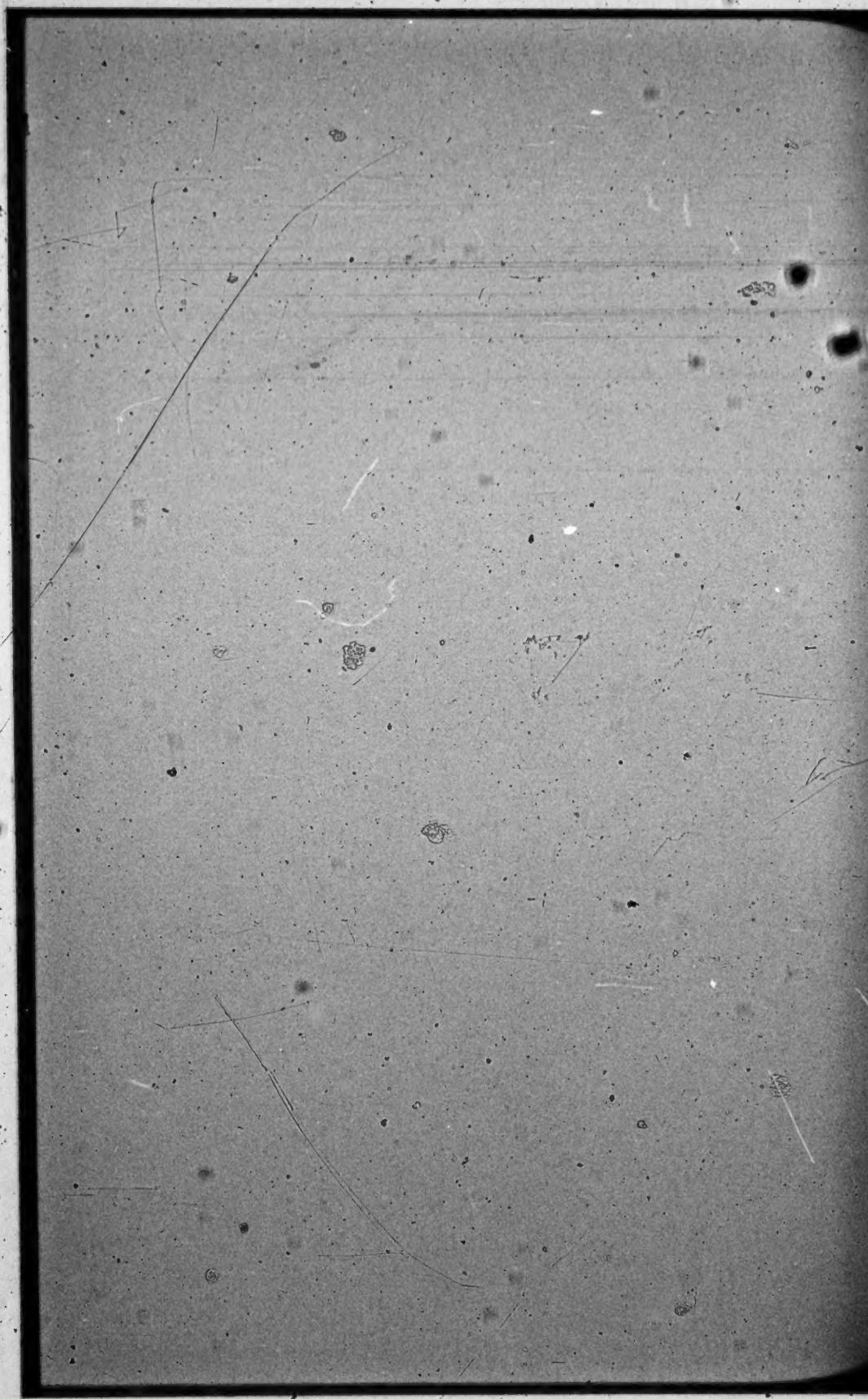

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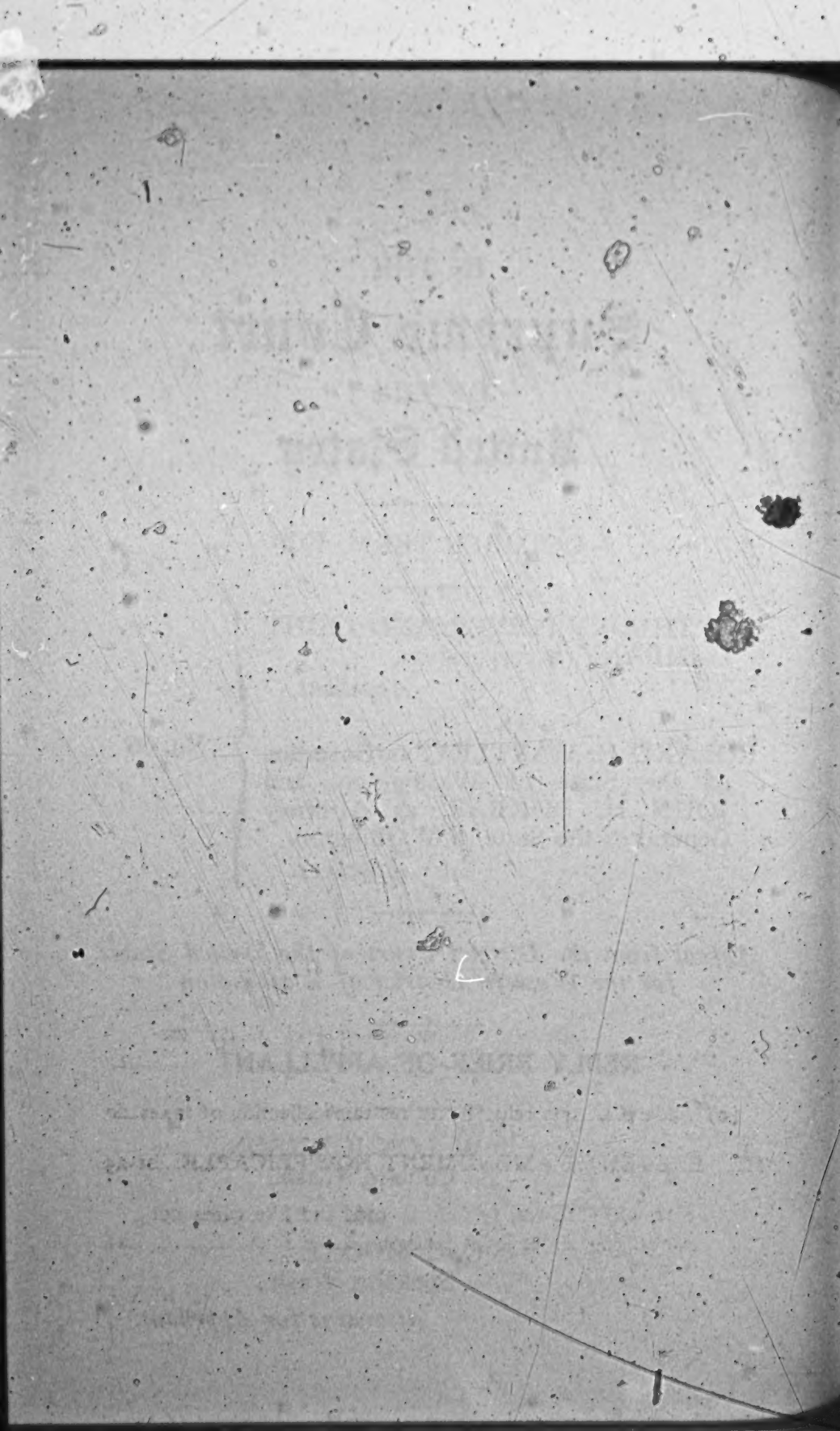

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I

NO WAIVER OF JURISDICTION

Seizing on an ill-chosen expression in appellant's brief to the effect that under two decisions of the state Supreme Court the 1921 Anti-Alien ownership statute is inapplicable to appellant's easements, considered as personalty, and that discussion would for that reason be confined principally to Sec. 33, Art. II of the State Constitution, it is contended (Appellees' brief, pp. 10, 11, 27, 32, 46) that a ground of federal jurisdiction is thereby waived and that this court has been deprived of jurisdiction or power to entertain this appeal.

The fallacy of this contention is not far to seek.

(a) Obviously the thought intended is that in so far as the 1921 Statute is *not* concordant with but broader in terms than Sec. 33, Art. II of the Constitution the decisions of the state court establish, without further discussion, that its enforcement against appellant's easements, considered in the category with leases, would be repugnant to the Contract Clause and the Equal Protection and Due Process Clauses of the 14th Amendment to the Federal Constitution, since leases under the state decisions are deemed to be

personal property, and that in so far as concordant with Sec. 33, Art. II of the Constitution, what might be thereafter said concerning the one would be equally applicable to the other.

The omission fully and clearly so to express the writer's meaning was a pure inadvertence, attributable perhaps to an undue regard for brevity. Waiver is a matter of intention, a voluntary relinquishment of a known right. Without intention no waiver can occur.

40 Cyc. 252, and numerous citations.

Clearly, no claim of waiver can be successfully predicated on an unhappy choice of inapt language intended as urging rather than waiving a consistently asserted constitutional right.

(b) It is elementary that jurisdiction, other than of the person, is not subject to waiver and may not be conferred by consent.

Gainsville vs. Brown-Crummer Inv. Co., 277 U. S. 54, 59, 72 L. ed. 781, 783.

Its existence or non-existence must be determined from the pleadings and the record, which the court will examine on its own motion without suggestion from counsel.

Minnesota vs. Hitcock, 185 U. S. 373, 46 L. ed. 954, 955.

(c) The complaint alleges that unless enjoined therefrom appellees will confiscate appellant's property under and by virtue of the 1921 Statute, and this allegation stands admitted for present purposes by the motion to dismiss.

That the allegations of the complaint bring the case within the purview of Sec. 380, U.S.C. is established by the authorities collated on pages 21 and 22 of appellant's opening brief and by many others that might be cited, some of which will be hereafter discussed under another and more appropriate head.

The jurisdictional grounds of this appeal, on the other hand, are set forth, with supporting authorities, in the printed statement filed by appellant pursuant to Rule 12, to which no answer or objection has been made by appellees or their counsel.

The District Court's summary of the pleadings and the arguments, 35 Fed. (2) 199, shows that the unconstitutionality of the 1921 Statute, as applied to appellant's rights, was urged below.

The refusal of the District Court to declare the 1921 Statute invalid is the basis of Assignments of Error 12 and 13 (Rec. p. 66) and these assignments are carried into appellant's brief, pp. 10 and 11, as Specifications of Error, 9 and 11. Also, in the first sentence

of appellant's statement of the issues, on the first page of the opening brief, it is stated that the suit is to enjoin the enforcement of the 1921 Statute as well as Sec. 33, Art. II of the Constitution. At page 3 the statute is again referred to and it is set out in full as Appendix I to the opening brief, while on page 29 authorities are collated in support of the contention that, in so far as by its terms it is broader than the constitutional provision, the statute, is repugnant to the Due Process and Equal Protection Clauses of the 14th Amendment and the Contract Clause of Art. I of the Federal Constitution, i. e. for reasons additional to those that may properly be urged against the constitutional provision, though the contract clause, cannot, of course, be urged against the pre-existing Sec. 33, Art. II of the State Constitution.

The entire record, including the opening brief taken as a whole, negatives any thought of remission of appellant's attack on the 1921 Statute. As said in *Dahnke-Walker Mill Co. vs. Bondurant,* 257 U. S. 282, 290, 66 L. ed. 239, 243,

> "It is loosely said in one of the briefs for the plaintiff that the 'sole question for decision' is whether the contract was a part of interstate commerce; but we attach no importance to this, because it not only is said in the same brief that the plaintiff 'maintained in the state court, and it maintains here, that the Kentucky statute, as con-

strued and applied in this case by the state court is unconstitutional under the commerce clause,' but much of that brief and of another is devoted to an effort to show the invalidity of the statute in that regard."

(d) The reference in appellant's brief to the two cases,

State vs. Natsuhara, 136 Wash. 436, 444, 240 Pac. 557;

State vs. Matomatsu, 139 Wash. 639, 247 Pac. 1032,

was merely arguendo. Immediately following, authorities in support of the claimed unconstitutionality of the statute are cited and the context of the entire argument thereafter shows the thought of the writer to have been that under the state decisions the 1921 Statute is inapplicable, in so far only as it is broader in scope than Sec. 33, Art. II of the State Constitution. The Washington Supreme Court has consistently sustained the validity of the statute,

State vs. O'Connell, 121 Wash. 542, 209 Pac. 865;

In re Fujimoto, 130 Wash. 188, 226 Pac. 505;

State vs. Natsuhara, 136 Wash. 436, 444, 240 Pac. 557;

State vs. Matomatsu, 139 Wash. 369, 247 Pac. 1032,

and the holding in the Natsuhara and Matomatsu cases, to the effect only that the statute is inapplicable to pre-existing leases on the ground that leases are not condemned by Sec. 33, Art. II of the State Constitution, is tantamount to holding it unconstitutional in so far as by its terms it purports to forfeit pre-existing leases.

The following from the Natsuhara opinion illustrates our point.

> "It will be observed that, by the constitution, the right of aliens to own real estate in certain respects is secured, and in other respects prohibited. No mention is made of leasehold interests. The constitution, therefore, does not prohibit the leasing of land to aliens for a reasonable length of time. *Terrace vs. Thompson*, 274 Fed. 841; *Terrace vs. Thompson*, 263 U. S. 197. * * * The lease here involved being valid when made (prior to 1921), the question arises whether the act of 1921 intended to operate against such interests. * * * There is another reason why the construction contended for by the state should not be given, if the act is reasonably susceptible of being construed as not to apply to prior valid leases. If it should be given a construction as applying to such leases, its constitutionality in this regard would be a grave question. * * * We, therefore, conclude that the act of 1921 does not, and was not intended to, apply to valid leases entered into in good faith prior to its enactment."

That a statute, in the relation here involved, may be unconstitutional in part only, was held in

Dahnke-Walker Milling Co. vs. Bondurant, 257 U. S. 282, 289; 66 L. ed. 239, 243, and

as further said in the same case,

> "A statute may be invalid as applied to one state of facts, and yet valid as applied to another. *Poindexter vs. Greenhow*, 114 U. S. 270, 295, 29 L. ed. 185, 194, 5 Sup. Ct. Rep. 903, 962; *St. Louis, I. M. & S. R. Co. vs. Wynne*, 224 U. S. 354, 56 L. ed. 799, 42 L. R. A. (N. S.) 102, 32 Sup. Ct. Rep. 493; *Kansas City Southern R. Co. vs. Anderson*, 233 U. S. 326, 58 L. ed. 983, 34 Sup. Ct. Rep. 599."

It is contended, however (Par. 7 of Points and Authorities, Appellee's Brief, pp. 14, 15), that appellant's easements,

> "constitute an interest in and ownership of real estate prohibited under the Constitution of Washington to a corporation with a majority of its stock owned by an alien."

Consistently with this contention, i. e. that the easements "Constitute an interest in and ownership of real estate," appellee cannot claim the advantage, if advantage there be, of anything said in the Natsuhara and Matomatsu cases with respect to leases there held not within the ban of the constitutional provision and not for that reason, if subsequently acquired, within the application of the 1921 Statute.

(e) Admittedly, appellees have threatened to enforce and, unless enjoined, will enforce the 1921 Statute against appellant and its property. The circumstance, therefore, that the State Supreme Court, in another and unrelated case, has held the statute inapplicable to certain antecedent property rights, leasehold estates, can be of no avail to appellees, since they admit their purpose to enforce it in the present instance and to escheat appellant's property thereunder. The statute has been held constitutional by the State Supreme Court in every relation in which it has been called on to consider it, and the question of its applicability in this or any case is and must be a mixed question of law and fact depending for solution on the controlling fact or facts in each particular case.

Should appellees' contention that the grants in question are easements appurtenant, a species of real estate, be sustained, it would follow, by their own argument, since alien ownership thereof, viewed as real estate, was forbidden by Sec. 33, Art. II of the State Constitution at the time of their acquisition in 1917, that they also come under the ban and strict letter of the 1921 Statute.

(f) That Sec. 33, Art. II of the Constitution and the 1921 Statute must be considered in *pari materia* is clear, not alone from the circumstance that they refer

to the same subject but from the further fact that the statute specifically refers to and provides for the enforcement of the Constitutional provision. Sec. 2 of the 1921 Statute, reads,

> "An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. *Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state.* Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state." (Italics ours).

Being in *pari materia,* it follows that whatever may be said in the instant case in discussion of Sec. 33, Art. II of the State Constitution has like application to the 1921 Statute, in so far as the two are concordant. That such is the thought and purpose intended to be conveyed throughout appellant's opening brief is believed to be apparent, regardless of any lack of nicety or exactness of expression.

(g) The foregoing is on the assumption, for purposes of argument, that the term "statute" as employed in Sec. 380, U. S. C., is to be strictly defined and does not comprehend the provisions of a State Constitution. Such construction is not, however, accepted in fact. It is believed, on the other hand, that in the relation in which it is used in Sec. 380, U. S. C., Sec. 266 of

the Judicial Code, the word "statute" must be held to include every form of state law or enactment, of which a constitutional provision is the highest expression.

That Art. VI, Clause 2 of the Federal Constitution condemns alike

"the Constitution or Laws of any State"

when in conflict with the Constitution and laws of the United States, and treaties made thereunder, is believed to be of the utmost significance. It is also of significance that the word "statute" is not found in the constitutional indictment, from which we conclude that it is not to be confined to legislative enactments, or to "statutes" in the narrow sense of the term. Being directed in the alternative to the "Constitution or Laws" of any state, it is believed reasonable further to conclude that in its use in Sec. 380, U.S.C., Congress contemplated the word "statute" in its generic sense and as comprehending every form of written state law, of which, as heretofore suggested, a state Constitution is the highest example.

Among other definitions, the Standard Dictionary gives the following:

> "* * * the written or statute law, *lex scripta*, in contradistinction to the unwritten or common law; positive law. Any authoritatively declared rule, ordinance, decree or law."

More comprehensively, *Bouvier's Law Dictionary* (3d ed), Vol. 3, p. 3129, states,

> "This word (statute) is used to designate the written law in contradistinction to the unwritten law. Among the civilians, the term statute is generally applied to laws and regulations of every sort; every provision of law which ordains, permits, or prohibits anything is designated a statute, without considering from what source it arises."

In *Williams vs. Bruffy*, 96 U. S. 176, 183, 24 L. ed. 716, with reference to the second section of the Amendatory Judiciary Act of 1867, it is said,

> "Any enactment, from whatever source originating, to which a state gives the force of law is a *statute* of the State, within the meaning of the clause cited relating to the jurisdiction of this court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the legislature. There may be many acts authorized by the constitution of a State, or by the convention that framed it, which have not been submitted to the consideration of its legislature, yet have all the efficacy of laws."

The above language is quoted with approval in *New Orleans Water Works vs. Louisiana Sugar Co.*, 125 U. S. 18, 31, 31 L. ed. 607.

The following is quoted from *Stevens vs. Griffith*, 111 U. S. 48, 50, 28 L. ed. 348,

> "Any enactment, to which a State gives the

> force of law, whether it has gone through the usual stages of legislative proceedings, or been adopted in other modes of expressing the will of the State, is a statute of the State within the meaning of the acts of Congress touching our appellate jurisdiction."

From the comparatively recent case of *Reinman vs. Little Rock,* 237 U. S. 171, 176, 59 L. ed. 900, 903, we quote,

> "* * * any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of Judicial Code, 237 (36 Stat. at L. 1156, Chap. 231, Comp. Stat. 1913, 1214), which confers jurisdiction upon this court. *Atlantic Coast Line R. Co. vs. Goldsboro,* 232 U. S. 548, 555, 58 L. ed. 721, 725, 34 Supt. Ct. Rep. 364, and cases cited."

Also,

> *Grand Trunk etc. Ry. Co. vs. Railroad Comm.,* 221 U. S. 400, 403, 55 L. ed. 786.

From *Railroad Co. vs. McClure,* 10 Wall, 511, 515, 19 L. ed. 997, the following pertinent language is quoted,

> "The Constitution of the United States declares, that no State shall pass a law 'impairing the obligation of contracts.' The constitution of a State is undoubtedly a law within the meaning of this prohibition."

In *New Orleans Gas Co. vs. Louisiana Light Co.,*

115 U. S. 650, 672, 29 L. ed. 516, with reference to the Contract Clause of the Federal Constitution, it is said,

> "A State can no more impair the obligation of a contract by her organic law than by legislative enactment; for, her constitution is a law within the meaning of the contract clause of the National Constitution. *Railroad Co. vs. McClure*, 10 Wall. 511, *Ohio Life Ins. Co. & T. Co. vs. Debolt*, 16 How. 416, 429; *Sedgwick's Stat. & Const. Law*, 637."

Concerning the jurisdiction of this court, under the then existing Judiciary Act, to review the final judgments of the highest court of a state

> "where is drawn in question the validity of a statute or of an authority exercised under any state"

on the ground of repugnance to the Federal Constitution, in *Railroad Co. vs. Rock*, 4 Wall, 177, 181, 18 L. ed. 381, it is held,

> "It must be the Constitution, or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States * * *.

Affirming this holding, in *Knox vs. Exchange Bank*, 12 Wall. 379, 383, 20 L. ed. 414, the court observed,

> "It must be the constitution, or statute, of the State which impairs the obligation of a contract

> or the case does not come within our jurisdiction."

Demonstrating the significance of the elementary proposition that a state constitution is the highest law of the state, many authorities are collected and reviewed in 12 C. J. at page 675.

We have not, in this connection, overlooked the holding in *Ex parte Collins*, 277 U. S. 565, 568, 72 L. ed. 990, 991, that Sec. 380 U. S. C. is inapplicable to suits seeking to enjoin the execution of muncipal ordinances, but it is believed that the following excerpts from that opinion fully differentiates and renders inapplicable to a State Constitution the rule there announced. It is there said,

> "* * * the section does not govern all suits in which it is sought to restrain the enforcement of legislative action, but only those in which the object of the suit is to restrain the enforcement of a statute of general application or the order of a state board or commission."

It also holds that the statute

> "does not apply where, * * * although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved."

To the same effect,

> "Congress realized that in requiring the presence of three judges, of whom one must be a Justice of this court or a circuit judge, it was imposing a severe burden upon the Federal courts. The burden was imposed because Congress deemed it unseemly that a single district judge should have power to suspend legislation enacted by a state."

It is most respectfully submitted that this case, involving as it does questions of constitutional law, national and state, the power of a state to destroy foreign commerce, likewise the construction of a foreign treaty, is a controversy of sufficient dignity and importance to remove it from the doctrine of the Collins case. It will not be disputed that in relative dignity state constitutions and municipal ordinances stand at the extreme polls of the field of written law. It results that the announcement in *Ex parte Collins*, that the jurisdiction of a three judge court, under Sec. 380, U. S. C. does not extend to municipal ordinances or to legislative enactments, where the suit involves matters of comparatively small importance and purely local interest, is without application in this discussion. The far reaching importance, on the other hand, of the questions here involved calls, it is believed, for liberal interpretation and for the favorable exercise of jurisdictional discretion to the end that those questions may be finally set at rest.

II

APPELLANT ENTITLED TO EQUITABLE RELIEF; NO REMEDY AT LAW

(a) Appellees contend (Brief pp. 21, 22), in line with the apparent view of the District Court, that equitable jurisdiction was exercised in *Terrace vs. Thompson,* 263 U. S. 197, 68 L. ed. 255, on the sole ground of claimed peril of criminal prosecution and that it will never be exercised to restrain judicial proceedings for the protection of property rights.

The following excerpt from the opinion clearly indicates the error of that contention and recognizes, on the other hand, the long established doctrine that relief in equity is essentially for the protection of property rights, whereas criminal proceedings are never restrained except as incident to the protection of property.

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity."

The holding in this regard, in *Terrace vs. Thompson*, was reiterated a little later in *Packard vs. Banton*, 264 U. S. 140, 143, 68 L. ed. 596, 607, from which the following is quoted:

> "But it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property.' *Truax vs. Raich*, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L. R. A. 1619D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. The question has so recently been considered that we need do no more than cite *Terrace vs. Thompson*, 263 U. S. 197, ante, 255, 44 Sup. Ct. Rep. 15, decided November 12, 1923, where the cases are collected, and state our conclusion that the present suit falls within the exception, and not the general rule."

(b) In the face of the statement beginning at the bottom of page 24 of appellee's brief,

> "We admit that we know of no means by which appellant would be able to institute any action at law in a Federal or state court for the purpose of having determined the issues which it seeks to raise in this action,"

the opposition urge, despite the almost innumerable decisions to the contrary, many of which are cited on pages 12, 24 and 25 of the opening brief, that all constitutional safeguards for the protection of appellant's property and property rights, likewise the established

procedure in the Federal Courts of Equity, are to be considered as satisfied by the fact, as phrased on page 25 of appellees' brief, that

> "In any event, in an action brought by the state in a state court, appellant would be permitted to raise all Federal and state constitutional questions, and would be entitled to an appeal to the state supreme court and by writ of error to come to this court for a decision on all Federal questions, as was pointed out by this court in *Georgia vs. Chattanooga*, 264 U. S. 472, (68 L. ed. 796) and in many other cases."

Georgia vs. Chattanooga, supra, is not in point. That was an original suit in this court by the State of Georgia to enjoin the City of Chattanooga from appropriating for its purposes certain lands in Tennessee owned by the former state. The city of Chattanooga had theretofore commenced condemnation proceedings in a Tennessee court, in which the State of Georgia was named as a defendant, and service on that state, as a non-resident, had been accomplished by publication.

Holding that the sovereignty of the State of Georgia was not extended into the State of Tennessee by virtue of its private ownership, for use in a private capacity, of land in the latter state; that its rights with respect to said land was not greater or different than that of a natural person and did not restrict or modify

the power of eminent domain of the State of Tennessee; that the state court wherein the condemnation suit was pending had jurisdiction; that the bill was totally wanting in equity and that Georgia had a plain, adequate and complete remedy in the *pending* condemnation proceeding, the suit was dismissed.

It does not appear that any state statute was attacked as in conflict with the Federal Constitution and it would seem that the dismissal might very well have been based on Sec. 379, U. S. C., Judicial Code, Sec. 265, providing,

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In the instant controversy no proceeding has been instituted in the state court. On the other hand, pursuant to Sec. 380, U. S. C. it is here sought to prevent a suit which it is admitted appellees will bring unless enjoined therefrom, a distinction so marked that further discussion is believed unnecessary. It should probably be noted, however, that the lack of equity in *Georgia vs. Chattanooga* places it in that regard, and apparently for the same reason, on a plain with *Boise Artesian Water Co. vs. Boise City*, 213 U. S. 276, 53

L. ed. 793, discussed and distinguished on page 18 of the opening brief.

(c) It should also be noted that *Boise Artesian Water Co. vs. Boise City*, as are most of the cases cited by appellees in this connection, was a suit to enjoin the collection of a tax, a form of relief which, because of reluctance to interfere with the fiscal operations of state and municipal governments, Federal courts, in the absence of special circumstances, have refrained from granting, if by payment of the tax under protest the taxpayer may, if thereafter the tax be found to have been illegally exacted, recover in an action at law. Where, in other words, by statute or otherwise, the full amount of the tax so payed may be recovered, it cannot be said that irreparable damage will be suffered in the absence of equitable relief. Hence an injunction will be denied, not strictly on the ground of the existence of an adequate remedy at law but because an avenue is afforded whereby, through the non-judicial step of paying under protest, the taxpayer may fully protect himself against the possibility of any loss whatsoever. Thus in *Henrietta Mills vs. Rutherford County*, 32 Fed. (2d) 570; 572, recently affirmed by this court, 281 U. S. 121, 123, 74 L. ed. 737, 745, it is said,

"The decisions of the Supreme Court indicate

> a proper reluctance to interfere by intervention with the fiscal operations of the state governments, and the federal courts have refrained from doing so when the federal rights of persons could be otherwise preserved. So it has been held that, if a statute of the offending state imposes upon the state officials the duty to refund taxes illegally collected, and confers upon the taxpayer a right to enforce that duty by an action at law, the remedy is adequate, and a suit in equity to enjoin the collection of the tax will not lie."

Examination of the authorities cited in support of the contention that appellant had a plain, adequate and complete remedy at law, too numerous for separate consideration, will show them to be inapplicable here, because it was not shown in those cases that, in the absence of injunctive relief, the complainants would have suffered irreparable loss.

III

ELEVENTH AMENDMENT INAPPLICABLE

In reliance principally, it would seem, on *Fitts vs. McGhee*, 172 U. S. 516, 43 L. ed. 535, it is contended that essentially this is a suit against the State of Washington, in derogation of the 11th Amendment to the Federal Constitution.

Fitts vs. McGhee has been so frequently considered and distinguished in subsequent decisions, with which this court is necessarily intimately familiar, that any

discussion of it by us at this late date would appear to be supererogatory and improper. We venture the suggestion, however, that it does not appear that the state officers against whom the suit was brought in that case were about to institute or had threatened to institute legal proceedings in the state court to enforce obedience to the allegedly unconstitutional state statute—only that third persons had

> "threatened to procure proceedings to be instituted in the courts by the governor and attorney general in the name of the state"

for its enforcement. It was not shown, in other words, that the plaintiff stood in peril of irreparable injury. It was found and adjudged, furthermore, that

> "neither the attorney general of Alabama nor the solicitor of the 11th Judicial District of the state appears to have been charged by law with any special duty in connection with the act of February 9, 1895.

In the instant case, on the other hand, Art. II of the 1921 Statute, which undertakes to forfeit not only lands conveyed to aliens subsequently to that act, but also

> "Land now held by or for aliens in violation of the *constitution* of the state is forfeited to and declared to be the property of the state,"

further provides, by Sec. 8, that

> "It shall be the duty of the attorney general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement."

This duty is also imposed on the attorney general under Remington's Compiled Statute, Sec. 112.

State ex rel Dunbar vs. State Board of Education, 140 Wash. 433, 249 Pac. 996.

Sec. 2, Art. III of the State Constitution provides, furthermore,

> "The supreme executive power of this state shall be vested in a governor, * * *"

and where the attorney general, on request by the governor, refuses to act, the governor may in his own name institute and prosecute necessary legal proceedings.

State ex rel Hartley vs. Clausen, 146 Wash. 588, 264 Pac. 403.

Whatever uncertainty may have existed with respect to *Fitts vs. McGhee,* in cases of this character, has been set at rest by numerous subsequent decisions.

As said in *Truax vs. Raich,* 239 U. S. 33, 37, 60 L. ed. 131, 133, with apparent reference to *Fitts vs. McGhee,* citing many authorities,

> "Whatever doubt existed in this class of cases

was removed by the decision in *Ex parte Young*, 209 U. S. 123, 155, 161, 52 L. ed. 714, 727, 729."

The following further language from *Truax vs. Raich*, supra, states, it is believed, the established rule,

> "As the bill is framed upon the theory that the act is unconsitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state."

A little later in *Adams vs. Tanner*, 244 U. S. 590, 592, 61 L. ed. 1336, 1342, which originated in the State of Washington and was a suit against the attorney general to enjoin the enforcement of an unconstitutional statute of that state, it is said,

> "Considering the doctrine affirmed in *Truax vs. Raich*, 239 U. S. 33, 60 L. ed. 131, L. R. A. 1916 D, 545, 36 Sup. Ct. Rep. 7, and cases there cited, the record presents no serious question in respect of jurisdiction."

From *Looney vs. Crane Co.*, 245 U. S. 178, 191, 62 L. ed. 230, 236, the following is quoted:

> "There is a contention to which we have hitherto postponed referring, that the court below was without jurisdiction because the suit against the state officers to enjoin them from enforcing the statutes in the discharge of duties resting upon them was, in substance and effect, a suit against

the state, within the meaning of the 11th Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities. *Ex parte Young,* 209 U. S. 123, 52 L. ed. 714 13 L. R. A. (N.S.) 932, 28 Supt. Ct. Rep. 441, 14 Ann. Mas. 764; *Western U. Teleg. Co. vs. Andrews,* 216 U. S. 165, 54 L. ed. 430, Sup. Ct. Rep. 286; *Home Telegh. & Teleg. Co. vs. Los Angeles,* 227 U. S. 278, 57 L. ed. 510, 33 Supt. Ct. Rep. 312."

More recent sustaining authorities are cited on pages 21and 22 of the opening brief.

IV

DUE PROCESS AND EQUAL PROTECTION

(a) Under the above head (p. 43, et seq.), also in discussion of the Commerce Clause of the Constitution (pp. 64, 65, 66, 67), much space in appellees' brief is devoted to *Terrace vs. Thompson,* 263 U. S. 197, 68 L. ed. 255, concluding with the broad assertion (p. 67),

> "we believe that case settles all questions raised in this case."

Appellant, on the other hand, makes no quarrel with *Terrace vs. Thompson,* but contends that it has no application whatever to any issue before the court. That case simply holds, as it has been many times previously and subsequently held, that, in the absence

of a treaty to the contrary, a state may on equal terms deny to all aliens the right to own land within its borders, provided, of course, that no sovereign or constitutional right of the Federal Government or persons entitled to its protection is invaded or disregarded, and that the 1921 Statute of the State of Washington, here in question, excluding from land ownership all aliens ineligible to citizenship was, in the respect in which it was there attacked, a proper exercise of the police power and not repugnant to either the Due Process or the Equal Protection Clauses of the 14th Amendment to the Federal Constitution. At no time has appellant disputed these propositions. On the other hand its entire case is bottomed on alleged repugnance to the Federal Constitution of the State Constitution and Statute, and the threatened enforcement thereof by appellees, on entirely different aspects of its constitutional rights.

(b) Appellant's contention, briefly stated, is that as a creature of the State of Washington, a corporate entity under the laws thereof, and a citizen of the state, as held by its highest court,

Hastings vs. Anacortes Packing Co., 29 Wash. 224,

authorized by its charter to own and hold land therein,

it is entitled for itself and its property, equally with every other corporation so created, to the protection of the laws of the land and of the state of its parentage, without regard to the transient circumstance of the unforbidden, not illegal, and, therefore, not judicially controllable ownership at any time of a majority or any portion or part of its capital stock, and that the 1921 State Statute and the closing sentence of Sec. 33, Art. II of the State Constitution, to the contrary in that regard are, in the respect in which appellees admit their purpose to enforce them against appellant and its property, void *ab initio*. As contended on page 45 of the opening brief, being void, the objectionable provision of the State Constitution is without force or affect, did not become a part of appellants charter and does not afford any basis for estoppel, since, as said in *W. W. Cargill Co. vs. Minnesota, etc.*, 180 U. S. 452, 468, 45 L. ed. 619, 626, and *Power Mfg. Co. vs. Saunders*, 274 U. S. 490, 497, 71 L. ed. 1165, 1169,

> "* * * the acceptance of a license in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States,"

a doctrine fully sustained by authority.

Frost vs. Railroad Comm., 271 U. S. 583, 596, 70 L. ed. 1101, 1106;

Williams vs. Standard Oil Co., 278 U. S. 235, 241, 73 L. er. 287, 309;

Hanover etc. Co. vs. Carr, 272 U. S. 494, 517, 71 L. ed. 372, 379.

Appellant further contends that the last sentence of Sec. 33, Art. II of the State Constitution providing that every domestic corporation

> "the majority of the capital stock of which is owned by aliens, shall be considered an alien;"

and disqualified from owning land in the state, together with the corresponding provision, Paragraph (a) of Sec. 1 of the 1921 legislative enactment, are repugnant to the Due Process and Equal Protection Clauses of the 14th Amendment, in that by their terms, dependent on the unrestrainable action of the majority stockholders, they render the property of private corporations subject to confiscation and forfeiture to the state, without the semblance of a hearing or right to be heard in a court of law or equity for the protection of their rights. Not only for the reasons just indicated, are the provisions of the state statute and state constitution, and the threatened action of appellees thereunder, violative of the Due Process

Clauses but they are also, and for the same reasons, violative of the Equal Protection Clause, in that, while retaining unimpaired its standing as a legal entity, a corporation through the transfer to aliens of a majority of its stock, is subjected to penalties to which other corporations in like standing are wholly immune.

It has already been shown, that in so far as the 1921 Statute is broader in its terms than the parent constitutional provision, it also, with respect to previously acquired property, violates the Contract Clause of the Constitution, while the invalidity of both the State Constitution and the State Satute, under the Commerce Clause of the Federal Constitution, will be discussed under another head.

Erroneously, on page 64 of their brief, appellees suggest that it was held in *Terrace vs. Thompson, supra,* that, consistently with the Due Process and Equal Protection Clauses, a state may deprive an alien of the right thereby guaranteed to him to engage in a useful and customary occupation and speciously inquires, on that false postulate,

> "Why may the state not by the same means, deprive him of his right to engage in interstate commerce?"

The suggestion is based on an erroneous interpretation of the decision in *Terrace vs. Thompson,* which

instead of holding that a state may deprive an alien of the right to engage in and earn a living in the customary occupation is predicated on a wholly different concept, as appears by the following excerpt from the opinion.

> "It was said (*Truax vs. Raich*, 239 U. S. 33, 37, 60 L. ed. 131, 133) that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the 14th Amendment to secure.
>
> In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state."

(c) Likewise without application is *Frick vs. Webb*, 263 U. S. 326, 68 L. ed. 323, sustaining a California statute forbidding ownership by aliens of stock in a private corporation authorized by its charter to acquire title to land in that state. The distinction is immediately obvious. Under the Washington law acquisition and ownership by an alien of stock in a real estate or land owning corporation is in no wise forbidden, though the penalty of forfeiture is visited on the corporation and the helpless minority stockholders should a majority of the stock at any time pass to alien ownership, the corporation itself remaining afoot the meanwhile as a duly authorized entity under the

general corporation laws of the state. This distinction points directly to the basis of appellant's contention that Sec. 33, Art. II of the State Constitution and the 1921 Statute are repugnant to the Due Process and Equal Protection Clauses of the 14th Amendment.

V

DESTRUCTION OF FOREIGN COMMERCE NOT JUSTIFIED UNDER POLICE POWER

(a) On authority of *Terrace vs. Thompson*, 263 U. S. 197, 68 L. ed. 255, and related cases, announcing the general doctrine that in the exercise of its police power a state many deny to aliens the right to own land within its borders, and on the further premise (appellees' brief, p. 63) that states have certain regulatory powers over interstate carriers with respect to purely local matters, though interstate commerce be thereby incidentally affected, the validity of the 1921 Statute and the corresponding state constitutional provision is sought to be sustained to the point of justifying the destruction of foreign commerce.

That in the absence of affirmative action by Congress a state, in the exercise of its reserve powers, may enact laws for the protection of the public health, the public morals and the public safety, is not, of course, open to question.

Field vs. Barber Asphalt Pav. Co., 194 U. S. 618, 48. L. ed. 1142;

Crossman vs. Lurman, 192 U. S. 189, 48 L. ed. 401;

Pennsylvania Ry. Co. vs. Hughes, 191 U. S. 477, 48 L. ed. 269;

Caldwell vs. North Carolina, 187 U. S. 622, 47 L. ed. 336.

The initial vice of appellee's contention is the failure to recognize this distinction. As observed in *Oregon-Washington R. & Nav. Co. vs. Washington*, 270 U. S. 87, 101, 70 L. ed. 482, 488,

> "In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress."

The reference in the last sentence, of the language just quoted, is made clear by the following from *Missouri ex rel Barrett vs. Kansas Natural Gas Co.*, 265 U. S. 298, 307, 68 L. ed. 1027, 1030, and squarely adapts the rule to the instant controversy.

> "In the absence of congressional legislation, a state may constitutionally impose taxes, enact inspection laws, quarantine laws, and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce.

Pennsylvania R. Co. vs. Hughes, 191 U. S. 477, 488-491, 48 L. ed. 268, 272, 273, 24 Sup. Ct. Rep. 132. But the commerce clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce."

(b) The power delegated to the Federal Government to regulate commerce between states and foreign nations is an attribute of sovereignty, from which it necessarily results that as against the exercise of that sovereignty in its proper sphere the police power a state presents no obstacle. As said in *Lacoste vs. Department of Conservation,* 263 U. S. 545, 549, 68 L. ed. 437, 440,

> "A state may not enforce any law, the necessary effect of which is to prevent, obstruct, or burden interstate commerce.

The doctrine for which we contend is impressively stated in the following excerpt from *Mackenzie vs. Hare,* 239 U. S. 299, 311, 60 L. ed. 297, 301,

> "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hestitate long before limiting or embarrassing such powers."

Kansas City Southern R. Co. vs. Kaw Valley Drainage Dist., 233 U. S. 75, 79, 58 L. ed. 857, 859, hold-

ing that it is not within the jurisdiction or power of a state court to order the removal of a bridge forming a necessary part of an interstate railroad, is believed to be directly in point.

> "The freedom from interference on the part of the states is not confined to a simple prohibition of laws impairing it, but extends to interfence by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a state could not stop the operation of the lines by an injunction for failure to pay taxes. * * * It would seem that the same principle applies to railroads under the commerce clause of the Constitution, especially if taken in connection with the somewhat similar statute, now Rev. Stat. 5258, U. S. Comp. Stat. 1901, p. 3564. And so it is held. * * * The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' * * * To destroy the bridges across which these railroad lines necessarily pass is at least as direct an interference with such commerce as to prohibit the importation of cattle or oleomargarin or the export of natural gas."

Quite close to the issue is the holding in *United States vs. Rio Grande Dam & I. Co.*, 174 U. S. 690, 709, 43 L. ed. 1136, 1144, that notwithstanding the

general power of a state to control and appropriate all waters within its borders for the use and enjoyemnt of its citizens, such appropriation must be with due regard for interstate commerce and in a manner not to interrupt or obstruct such commerce, though the stream immediately involved be itself non-navigable, if by its depletion the navigability of the stream into which it flows be imperiled. In the course of an extended opinion, by way of illustration, it is there said,

> "Unquestionably the state of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney-General to institute proceedings to restrain such appropriation."

The following excerpt from the comparatively recent opinion by Mr. Justice Holmes in *Sanitary District of Chicago vs. United States,* 266 U. S. 405, 426, 69 L. ed. 352, 363, citing with approval *Kansas City South-*

ern R. Co. vs. Kaw Valley Drainage Dist., supra, strongly sustains appellant's contention.

> "As to its ultimate interest in the lakes, the reasons seem to be stronger than those that have established a similar standing for a state, as the interests of the nation are more important than those of any state. * * * In matters where the states may act, the action of Congress overrides what they have done. * * * But in matters where the national importance is imminent and direct, even where Congress has been silent, the states may not act at all."

The doctrine for which appellant contends is no where more strongly stated than by Mr. Chief Justice Marshall in the great case of *McCulloch vs. Maryland*, 4 Wheat, 316, 405, 4 L. ed. 579,

> "If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the State legislatures, and the

officers of the executive and judicial departments of the States, shall take the oath of fidelity to it."

(c) The suggestion at page 67 of appellees' brief that the questions here raised under the Commerce Clause of the Constitution are settled by the decision in *Terrace vs. Thompson, supra,* is obviously without merit. The Commerce Clouse is not mentioned in the opinion and was in no sense involved in that litigation.

With a view to bringing Nakatsuka within the protection of the treaty between the United States and Japan, under an amended complaint, the contention was made that Nakatsuka was

> "engaged in the business of trading, wholesale and retail, in farm products and shipping the same in interstate and foreign commerce,"

and desired to continue to produce his own farm products for the purpose of selling them in such wholesale and retail trade which he would not be able to do if prevented from leasing land for the purpose of producing farm products for such trade. The court said,

> "We think that the treaty not only contains no provision giving Japanese the right to own or lease land for agricultural purposes, but, when viewed in the light of the negotiations leading up to its consummation, the language shows that the high contracting parties respectively intended to withhold a treaty grant of that right to the citizens or

subjects of either in the territories of the other. The right to 'carry on trade' or 'to own or lease and occpy houses, manufactories, warehouses, and shops,' or 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade,' cannot be said to include the right to own or lease, or to have any title to or interest in, land for agicultural purposes. The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes."

That *Terrace vs. Thompson* has no casual bearing on any question in this controversy, under the Commerce Clause of the Constitution, is too clear for extended discussion.

Omission further to amplify here other questions advanced in the opening brief is not to be taken as a waiver in any sense of those contentions.

Respectfully submitted,

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